JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 36 of 1995

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	THE ADMINISTRATOR GENERAL OF JAMAICA ESTATE OF PATRICIA KING	APPELLANT
A N D	DUDLEY BLAKE	RESPONDENT

Sandra Johnson for the appellant instructed by Robinson, Phillips & Whitehorne

Alexander Williams for the respondent instructed by Myers Fletcher & Gordon

September 22, October 21, 1997

FORTE J.A.

I have read the judgment of Downer, J.A. which follows and agree with his reasons and conclusions.

DOWNER, J. A.

Chester Orr, J. in Chambers dismissed for want of prosecution, the claims of the estate of Patricia King brought pursuant to the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act. The estate was aggrieved by that order, and so seeks to set it aside by appealing to this court. It is pertinent to cite the order made in the court below because it does not appear that leave to appeal was sought or expressly granted. However, since the matter was fully argued in this court as an appeal it was appropriate to deem that there was an application for leave which was granted and to decide the hearing on the merits. Here is the order:

> 1, "That this action be dismissed against the First Defendant for want of prosecution
>
> 2. Costs to First Defendant to be agreed or taxed.

Also to be noted is that the second and third defendants Lloyd Fagan and Desmond Sutherland took no part in the proceedings below or in this court.

The period of delay which gave rise to proceedings to dismiss the action for want of prosecution

The accident which resulted in the death of Patricia King occurred on February 25, 1984 and proceedings were instituted by Writ of Summons on 23rd February, 1987.

The endorsement on the Writ summarises the nature of the claim. It reads:

> "The Plaintiff's as Administrator of the Estate of PATRICIA KING deceased bring this action for:-
>
> (a Damages under and by virtue of the Fatal Accident Act of Jamaica and amendments thereof for the death of the deceased.

> (b) Damages under and by virtue of the Law Reform (Miscellaneous) Provisions Act for the benefit of the estate of the deceased for the loss of expectation of life and consequential loss caused to the said deceased.
>
> Caused by the negligent driving of the First and Second Defendants for that the 25th day of February, 1984 the deceased whilst a passenger in Toyota Mini Bus lettered and numbered LN 9374 owned and driven by the first Defendant travelling from Runaway Bay to Ocho Rios at a point near Llandovery in the parish of St. Ann, sustained serious injuries, resulting in her death, when the said Toyota mini bus collided with International Truck lettered and numbered S 4310 owned by the third named Defendant. The said accident was caused by the negligent driving of the First Defendant and the Second Defendant the servant or agent of the Third Defendant."

The respondent entered Appearance on 22nd of May, 1987 and a Statement of Claim was filed it seems on March 2, 1991. The Summons to Dismiss was dated 7th November, 1994.

It is in the light of this chronology that it is appropriate to enquire what was done by the appellant's estate during the period 2nd of March, 1991 when the statement of claim was filed and 7th November, 1994, when Summons to Dismiss for want of Prosecution was served.

Was there a failure of the appellant to provide particulars so that the claim for damages could be quantified by the respondent?

The essential point to note is that the respondent admitted liability from the outset so the issue was, if there were to be a settlement or a contest what would be the quantum. On either basis full particulars would have to be supplied by the claimant's estate. The

correspondence bears out the respondent's request for these particulars. Here is the initial request by the respondent dated 20th May, 1987 three (3) months after proceedings were instituted.

"WITHOUT PREJUDICE

Messrs, Robinson, Phillips & Whitehorne

Attorneys-at-Law

13 Duke Street

Kingston

Dear Sirs:

Re: Suit No. C.L. A. 037 of 1987 The Administrator General of Jamaica (Adm. of the Est. of Patricia King, dec'd) vs Dudley Blake et al.

We act for the Defendant in this matter through his Insurers, Motor Owners Mutual Insurance Assen. Ltd. and we have entered Appearance, courtesy copy of which should shortly be served on you.

We have received instructions from our client to approach you with a view to negotiating an amicable settlement herein and as such we ask that you let us have details of your client's claim with substantiating vouchers and receipts for our consideration, after which we will ask that you contact us with a view to setting up an appointment where we can finalize settlement in this matter.

We look forward to your very early response

Yours faithfully

MYERS, FLETCHER & GORDON

MANTON & HART

Per: S.M. SHELTON"

It would have been necessary to ask for particulars even when the averments in paragraph 5 of the Statement of Claim were available, that paragraph reads:

> "5. At the time of her death the deceased was aged 32 years and in excellent health. She was the sole support of herself and her three children. She earned her living as a Dancer, performing with the Rosita Johnson Dance Troupe in Hotels along the North Coast. Her average weekly earnings during the Winter season (15th December, to 15th April) were $250:00 and during the off season $150:00. Apart from such sums as the deceased spent exclusively upon herself or for her own benefit which sum is estimated at about $40:00 per week. The deceased net earnings were expended exclusively for the benefit of the said three children. Upon this basis the value of the said dependency at the date of the said accident was about $7,320:00 per year. Had the deceased survived her earnings would now be $900:00 per week in the Winter Season and $600:00 per week in the off season. As her earnings increased it is probable that the amount spent on her children would have increased proportionately."

The second attempt by the respondents was made on 1st April, 1992. It reads:

> " Dear Sirs
>
> **Re: Suit No. C.L.A. 037 of 1987 The Administrator General of Jamaica (Adm. of the Estate of Patricia King, dec'd) - v- Dudley Blake et al**
>
> We acknowledge receipt of your Statement of Claim. Please let us have details of your client's claim in respect of general damages under the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Act, so that we may negotiate a settlement.
>
> Yours faithfully
>
> MYERS, FLETCHER & GORDON"

Then there was a reminder of 4th May, 1992. Further there was another reminder on 18th May, 1992, which reads:

> **"Re: Suit No. C.L.A. 037 of 1987 The Administrator General of Jamaica (Adm. of the Estate of Patricia King, dec'd.)- v- Dudley Blake et al**
>
> Please refer to our letter dated 1st April, 1992. We trust that no steps have been taken in default of Defence, in view of that letter. In any event, let us have your response.
>
> Yours faithfully
>
> MYERS, FLETCHER & GORDON
>
> MANTON & HART"

The salient feature to note is that these particulars sought were never supplied. In light of this the only basis on which the learned judge's discretion could be overturned would have been if there was a reasonable excuse on the part of the appellant. The affidavit must now be examined to see whether there was any basis made to substantiate the principal reasons advanced by the appellant to set aside the order of the learned judge in Chambers. Here they are:

> "(i) That the learned judge in Chambers failed to exercise his discretion judicially and dismiss the action for want of prosecution without determining whether the delay in prosecuting the action was inordinate by reason of being without a credible excuse.
>
> (ii) That the Order made Dismissing the Action for want of Prosecution was unsupported by the Affidavit evidence as the First Defendant failed to show that he was seriously prejudiced by the delay.
>
> (iii) That the Order Dismissing the Action for want of Prosecution failed to have regard to the Justice of the case bearing in mind the merits of the Plaintiff's case and whether it would go largely without a remedy against a Defendant who had no defence to the action."

The initial affidavit from the attorney-at-law, Yvonne Marjorie Bennett in support of the claimant's estate reads, in part:

> '3. That this matter has presented many problems in that it has been extremely difficult to obtain information for the conduct thereof as the Dependants of the deceased were all infants and the adult who gave the instructions for prosecution of the Suit resides in the United States and only visits Jamaica periodically.
>
> 4. That eventually an opinion of our quantum of damages was obtained from Miss Sandra Johnson of Counsel who instructed in the matter, as Counsel originally retained was unable to deal with the matter expeditiously due to pressure of work.
>
> 5. That the opinion was received in my office on or about the 25th day of May 1994, and I immediately drafted a letter and gave it to a Clerk with instructions for engrossing same and photocopying the opinion to be sent to the Defendants Attorneys-at-law."

As to whether the opinion of the 25th day of May, 1994, was sufficient, the court cannot say . It was not part of the record nor was it adduced before this court. In any event even if it had been adequate, the lapse of time would be a factor to take into account.

The further explanation in the affidavit of Yvonne Bennett, attorney-at- law offered no reasonable excuse. It reads:

> '6. That it completely escaped my attention that the letter was never brought back to me for signature, and unaware that the letter was never in fact sent out, I even spoke to a Mr. Mordecai an Attorney-at-law representing the insurance Company of the first Defendant informing him that I had in fact received an opinion and has sent it off to Messrs Myers Fletcher & Gordon for their attention.
>
> 7. That during the month of October 1994 I discovered that several letters had been misdirected and in some cases misfiled whereupon the clerk was dismissed from the firm.

> 8. That at the end of December 1994 I discovered that the handwritten letter which I had drafted for typing for dispatch to Messrs Myers Fletcher & Gordon was still in the file wherefore I telephoned Mr. Alexander Williams on 5th of January 1995 and explained what had happened and told him that I was sending the letter to him immediately. That Mr. Williams has informed me that he had taken steps to have the matter struck out, and would be serving me with the Summons for which he had already obtained a date for hearing. I dispatched the letter to him on the 5th day of January 1995 and exhibit herewith marked Y.M.B.I. a copy thereof together with the exhibit and my firm was served that same afternoon with the Summons herein."

Then there is a significant paragraph in the affidavit of Ms. Sandra Johnson of counsel who appeared for the claimant's estate. She stated that:

> '8 That the matter was referred to Mr. Donald A. Scharschmidt for an opinion concerning the damages but was returned to us to supply further information as what detail he had was insufficient to do a proper assessment of damages."

So here is a candid admission by leading counsel that those instructing had failed to provide the essential particulars for drafting an opinion.

The additional paragraphs when analysed indicate that the vital particulars were never obtained. Here was how Ms. Sandra Johnson deponed:

> 9. That the Plaintiff's Attorneys-at-law made several attempts to obtain further information from the Deceased common Law husband, Thomas Cronin an American Citizen residing in Jamaica at the time of the accident but was largely unsuccessful as they could not ascertain his whereabouts.
>
> 10. That in and around 1992, the Plaintiff's Attorneys-at-law learnt that Thomas Cronin who was the person instructing them, returned to the United States and did not show much interest in the continuation of the matter after many attempts to make contact with him.

> 11. That it was around this time that one of the children of the Deceased, Allison Marsh reached the requisite age of majority and showed an interest in continuation of the matter by the provision of vital information obtained from various sources which led to the drafting, filing and service of a Statement of Claim in around April 1992.
>
> 12. That in May 1992, the First Defendant's Attorneys-at-law wrote to Messrs. Robinson, Phillips & Whitehorne asking for details of the Plaintiff's Claim and requesting that no step in default was to be taken inspite of the non-filing of a Defence.
>
> 13. That once again the matter was referred to Mr. Donald Scharschmidt and then to myself for an opinion."

Here is an admission that no efforts were made to secure representation on behalf of the infants. There is a useful passage in **Patrick Valentine v Nicole Lumsden (an infant) and Lascelles Lumsden (Next friend)** unreported S.C.C.A. 106/92 delivered December 6, 1993 where I wrote:

> 'Much emphasis was laid on the fact that the victim was an infant. Since the rules of court provide for the next friend as her representative, there can be no exception. For instance, Winn, L.J. refers to a person under disability in **Martin v. Turner** (1970) 1 W.L.R. 258. In demonstrating that the court does not regard disability as a special factor where delay is concerned, His Lordship states at page 261:
>
> > 'Every person in this country who is of full age and suffering from disability is entitled to come to the court and, in accordance with the rules of the court, conduct litigation in an attempt to recover damages, or assert another claim in respect of what he has suffered. If, as Davies LJ has indicated, Dr. Blair was really intending to be precisely judicial in assessing the degree of responsibility of the plaintiff by (for example) the McNaghteen rules, then he certainly did not declare him to be, or have been, insane. On the other hand, if he had taken that view, then proceedings could have been brought under RSC Ord 30 which would have enabled

> representation to be afforded and this claim to have been competently presented on behalf of the injured man. If he was not under such a disability as can be dealt with under the provisions of that rule, then he must be held responsible for his process of litigation.'
>
> The same principle applies to an infant. It is important to reiterate that once a matter is before the court, then the court controls the pace of litigation and rules are designed to ensure promptness. This was recognised and acted on in **Kerr v. National Carriers** (1974) 1 Lloyd's Law Report 365 at page 367 to 368 where Edmund Davies LJ puts it thus:
>
> > 'Accordingly, there is a supervising duty vested in the Court of scrutinizing cases such as the present.

The opinion referred to by Ms. Sandra Johnson was never brought to the attention of this court. Moreover, the problems caused by the inefficiencies in the offices of the attorney-at-law were not a reasonable excuse in the eye of the law. See **City Printery Ltd. v. Gleaner Co. Ltd.** [1968] 10 J.L.R. 506. Also the respondent's affidavit which the learned judge must have taken into account in exercising his discretion to dismiss for want of prosecution must be considered. Here are the relevant paragraphs:

> '4. The delay in the Plaintiff's attorneys providing sufficient details of their claim (along with supporting documents) have severely prejudiced the First Defendant on the issue of quantum.
>
> 5. Because no details have been supplied in response to our several requests, we, as attorneys for the First Defendant, are unable to verify or investigate the alleged earnings of the deceased and therefore we are not able to advise our client on an appropriate settlement figure which would, among other things, inform our clients as to the appropriate quantum to pay into court, if a settlement is not concluded. The First Defendant has been deprived of that opportunity.

> 6. Furthermore, we are unable to discover from the Statement of Claim whether or not the beneficiaries in the estate of Patricia King, deceased, are, in fact, also the dependents under the Fatal Accidents Act as particularised at paragraph 4 of the Statement of Claim. This information is crucial in order to determine whether or not the amount payable under the Fatal Accidents Act should be deducted from the amount payable under The Law Reform (Miscellaneous Provisions) Act."

The authorities applicable to the circumstances of this case

Gloria v. Sokoloff [1969] 1 All E.R. 204, cited with approval at page 4 in **Patrick Valentine v. Nicole Lumsden (an infant) and Lascelles Lumsden (next friend)** (supra), was a case where liability was admitted. The relevant principle was stated thus by Lord Denning, M.R. at page 205:

> 'Counsel for the plaintiff presented a forcible argument to us. He pointed out that in this case, unlike the others we have had, liability is admitted. The only issue is damages. He said that in such a case it would be a most drastic course to strike out the action altogether - thus relieving the defendants of an admitted liability. I appreciate the force of that argument, but still the principles stated in **Allen v. Sir Alfred McAlpine & Sons, Ltd.** (1968) 1 All E.R. 543; (1968) 2 Q.B. 209 apply just the same. If the plaintiff by her advisers has been guilty of prolonged and inexcusable delay which has seriously prejudiced the defendants on the issue of damages, so that there is a substantial risk that a fair trial of that issue cannot be had, then the action may be struck out for want of prosecution, leaving the plaintiff to her remedy against her own solicitor."

Another demonstration that inexcusable delay is a factor to be taken into account as regards damages is illustrated by the following statement by Davis, J. in **Martin v. Turner** (1970) 1 All ER 256 at 260. It reads:

> 'But there is another matter with regard to damages. The defendant was obviously throughout most anxious to settle this action. Had he had any material put before him on which he could make some sort of attempt to evaluate the worth of the claim, he no doubt would have been most anxious to make a payment into court, in order to get rid of it. He has been deprived of that opportunity. It is said, however, that really he has not lost very much, that very little costs have been incurred through the fact that the action has gone to sleep and that if he makes a payment into court now it might be, it is suggested, antedated, or that anyway when more precise particulars of the claim are put forward he would be in just as good a position to make a payment -in as he would have been years ago. Again I cannot agree. It seems to me that if this defendant had been in a position to pay in £x in 1962, 1963, 1964, 1965, he might have been in a much more favorable position than he is now."

In an appeal from Jamaica the general principle governing this branch of law was stated by Lord Brandon in **Murray Warshaw et al v Willard Drew** (unreported) P.C. No. 18 of 1988 delivered 21st. May, 1990. Here is the passage at pp. 7-8:

> "Their Lordships turn now to the question of dismissal of the action for want of prosecution on the basis that the service of the writ was accepted by Edsel Keith on the appellant's behalf. The principles governing the court's power to dismiss an action on that ground are not in doubt. They were authoritatively stated by the Court of Appeal in England in **Allen v. Sir Alfred McAlpine & Sons Ltd.** [1968] 2 Q.B. 229, a decision later expressly approved by the House of Lords in **Birkett v. James** [1978] A.C. 297, and have been to some extent developed in subsequent English cases. Leaving aside cases of contumelious behavior on the part of a plaintiff or his lawyers, of which the present case is clearly not one, the authorities referred to show that dismissal of an action for want of prosecution will only be justified if the following matters are established: first, that there has been inordinate and inexcusable delay in the prosecution of the action on the part of the plaintiff or his lawyers; and secondly, that such delay has given rise to a substantial risk that a fair trial of

> the action will no longer be possible, or has caused serious prejudice to the defendant in one way or another (see for example **Biss v. Lambeth, Southwark and Lewisham Area Health Authority (Teaching)** [1978] 1 W.L.R. 382, where it was held that persons could be seriously prejudiced by having an action hanging over their heads indefinitely."

This position has been reiterated by the House of Lords as recently as 24th April, 1997 Sessions 1996-97 Publications on the Internet Judgments in **Grovit and Others v Doctor and Others** where Lord Woolf said at p.2.

> 'The approach which is adopted at the present time by courts on an application to dismiss an action for want of prosecution is set out by Lord Diplock in **Birkett v. James** [1978] A.C. 297. 318F-G Lord Diplock basing himself upon a note in the **Supreme Court Practice** (1976) to **R.S.C., Ord.25, r. 1 said:**
>
> > 'The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such a delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

Since an express request for leave to appeal was not made it is useful to cite the following additional passage from **Birkett v. James** where Lord Diplock, said at p.317.

> 'It is only very exceptionally that an appeal upon an interlocutory order is allowed to come before this House. These are matters best left to the decision of the masters

> and, on appeal, the judges of the High Court whose daily experience and concern is with the trial of civil actions. They are decisions which involve balancing against one another a variety of relevant considerations upon which opinions of individual judges may reasonably differ as to their relative weight in a particular case. That is why they are said to involve the exercise by the judge of his "discretion." That, and the consequent delay and expense which appeals in interlocutory matters would involve, is also why no appeal to the Court of Appeal from his decision is available except with the judge's leave or that of the Court of Appeal. Where leave is granted, an appellate court ought not to substitute its own "discretion" for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he had decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision only in cases either (1) where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account; or by failing to give weight to something which he ought to take into account; or (2) as in **Ward v. James** [1966] 1 Q.B. 273, in order to promote consistency in the exercise of their discretion by the judges as a whole where there appear, in closely comparable circumstances, to be two conflicting schools of judicial opinion as to the relative weight to be given to particular considerations."

Conclusion

The failure to supply the appropriate particulars even at the hearing of the appeal was the telling factor against the appellant. To reiterate, proceedings were initiated 23rd February, 1987, the Summons to dismiss for want of Prosecution was filed and served November 7, 1994.

Without particulars the respondent would never have been able to quantify the claim so as to negotiate a settlement. Further, if the case went to trial there would be no

basis on which the court could proceed to assessment of damages. The outcome must be that the appeal ought to be dismissed that the respondent must have his taxed or agreed costs.

GORDON, J.A.

I agree.